

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert Carrasco Gamez,

Plaintiff,

v.

Charles L. Ryan, *et al.*,

Defendants.

No. CV-13-01757-PHX-JJT

ORDER

At issue are Plaintiff Robert Carrasco Gamez, Jr.'s Motion to Amend the Complaint in this matter (Doc. 42) and submit a Fourth Amended Complaint ("FAC"); Motion for Entry of Default as to Defendant Antoinette Gatlin (Doc. 46); a Report and Recommendation ("R&R") (Doc. 47) prepared by Magistrate Judge Deborah Fine addressing both Motions, to which Plaintiff has filed an Objection (Doc. 49); and Plaintiff's Motion to Appoint Counsel (Doc. 50).

On April 20, 2015, the Court dismissed without prejudice Counts One, Two, Four and Five of the Third Amended Complaint ("TAC"), and dismissed without prejudice Defendants Ryan, Hetmer, Fizer, Quintero, Crabtree, Washburn, Gidcumb, Brass, Cisneros and Garcia. (Doc. 31.) It ordered the lone remaining Defendant, Gatlin, to answer Count Three of the TAC after she was served, and ordered Plaintiff to serve Gatlin on or before July 21, 2015. On May 21, 2015, Plaintiff filed his FAC, which the Court struck as unauthorized pursuant to Federal Rule of Civil Procedure 15(a)(1). Plaintiff then filed the instant Motion for Leave to Amend (Doc. 42). Plaintiff's proposed FAC would resuscitate dismissed Claim Four from the TAC (embodying a claim for

1 threat to safety or failure to protect) and dismissed Claim Five from the TAC (embodying
 2 a claim for violation of Due Process rights), and would add defendants to surviving
 3 Claim Three (inadequate medical care).¹ Subsequently, Plaintiff sought to enter default
 4 judgment against Defendant Gatlin.

5 **I. Addition of Defendants in Claim Three – Inadequate Medical Care Claim**

6 In her R&R, Magistrate Judge Fine addressed both Plaintiff's Motion to Amend
 7 and his Motion for Default. Judge Fine first analyzed Plaintiff's attempted amendment of
 8 his surviving inadequate medical care claim in Claim Three of the FAC to include two
 9 additional defendants—Arizona Department of Corrections Director Ryan and a nurse, D.
 10 Shamblin. This Court adopts the R&R's recommendation that it deny leave to amend for
 11 the purpose of expanding Claim Three to add the new Defendants, and Judge Fine's
 12 reasoning therefor, in whole. As was the case in previous versions of his Complaint,
 13 Plaintiff has failed to allege any facts that would give rise to a claim of deliberate
 14 indifference as against Defendant Shamblin, and allowing Plaintiff to amend his
 15 Complaint yet again does not address this deficiency, because there still are no such facts
 16 stated. Similarly, Plaintiff's attempts to allege claims against Defendant Ryan have failed
 17 to meet the mark for all the reasons listed in the R&R, which this Court will not repeat
 18 now.

19 In his Objections, Plaintiff argues that the R&R would require him to give a
 20 narrative in his Complaint, or in the alternative, hold him to a "hypertechnical standard of
 21 detail." (Doc. 49 at 14.) The Court disagrees. The point of the pleading rules is to require
 22 a complaint to state sufficient facts to satisfy each element of a claim. That does not
 23 amount to, as Plaintiff appears to believe, legally conclusory language without the facts
 24 that lead to such conclusions. In other words, it is not enough simply to say, regarding
 25 Claim Three, that either Defendant Shamblin or Ryan were "deliberately indifferent," as
 26 Plaintiff has done repeatedly. Plaintiff must state specific facts from which one could

27 ¹ Plaintiff does not attempt to resurrect in the FAC his claims for assault (dismissed
 28 Claim One) and excessive force (dismissed Claim Two), so the Court need not address
 them.

1 draw the conclusion that they were in fact indifferent under the legal standards as set
2 forth in detail in Judge Fine's R&R. Plaintiff stated no such facts with regard to either
3 Defendant Shamblin or Ryan, and it would be futile for Plaintiff to attempt to amend
4 again, as these facts do not appear to be available as to either of these Defendants. Even if
5 they were, Plaintiff has now had multiple opportunities to perfect the claim and the Court
6 has advised Plaintiff multiple times what he needed to do to meet the pleading standards,
7 but he has failed to do so. The Court will not allow Plaintiff to amend Claim Three again
8 for this purpose. It is time to move forward with this action.

9 **II. Claim Four – Failure to Protect Claim**

10 The R&R next recommends that the Court deny Plaintiff's Motion for Leave to
11 Amend to add back in the previously dismissed Claim Four, in which Plaintiff alleges
12 threat to safety and failure to protect. Again, for the reasons detailed in Judge Fine's
13 R&R, the Court will deny the Motion. Plaintiff again objects that the R&R would require
14 him to state an "overbroad narrative" and hold him "to a hypertechnical standard."
15 (Doc. 49 at 2.) But that is not the reasoning set forth in the R&R. Plaintiff simply has not
16 stated facts from which to conclude that that any specific defendant knew or should have
17 known prior to his assault on September 7, 2011, that inmate Garcia posed a substantial
18 threat to him. Alleged gang retribution lists from 2009 and 2010 do not meet the
19 standard, as this Court noted in dismissing Claim Four of the TAC in April of 2015, but
20 Plaintiff continues to assert the same argument without change. The Court will deny the
21 Motion to Amend as it regards dismissed Claim Four.

22 **III. Claim Five – Due Process Claim**

23 Judge Fine also recommends that the Court deny Plaintiff's Motion for Leave to
24 Amend insofar as it seeks to renew his dismissed Claim Five, in which he alleges that
25 several detention officers and supervisors violated his Due Process rights by misapplying
26 the prison disciplinary process to him. In so recommending, Judge Fine observes in the
27 R&R that Plaintiff states in the FAC the same facts that this Court previously found
28 inadequate to state a claim. Undeterred, Plaintiff restates these same facts one more time

1 in his Objection, and in so doing ignores and argues right past the reasoning Judge Fine
2 set forth. There is nothing new here. As this Court previously held, Plaintiff's allegations,
3 even if taken as true, do not demonstrate that he suffered any atypical and significant
4 hardships, and he is not entitled to a particular security classification or housing
5 designation. The Court will deny the Motion to Amend as it regards dismissed Claim
6 Five.

7 **IV. Motion for Default**

8 Finally, the R&R recommends denial of Plaintiff's Request for Entry of Default as
9 against Defendant Gatlin. The R&R noted that shortly after the Court ordered Gatlin to
10 respond to the TAC, and before Plaintiff even served the TAC to her, Plaintiff filed a
11 FAC and then the instant Motion to amend, thus taking this matter off track. Plaintiff's
12 Objection to the R&R is simply to restate the text of Federal Rule of Civil Procedure 12
13 regarding the time limits for answering a complaint. This does not address Judge Fine's
14 analysis that by filing another amended complaint before the last one was served,
15 Plaintiff has injected delay into the process and uncertainty on the part of Defendant
16 Gatlin and her counsel as to what complaint she should answer. The Court will deny
17 Plaintiff's request for default at this point.

18 Having now denied all amendments to the TAC which Plaintiff sought in his
19 Motion, some certainty is reestablished that the TAC is the operative Complaint in this
20 matter, and Claim Three is the only surviving claim to which Defendant Gatlin should
21 respond. The Court will direct her to answer that claim.

22 **V. Motion for Appointment of Counsel**

23 Plaintiff seeks appointment of counsel in this matter, citing his limited knowledge
24 of the law, the complexity of issues in the case and his limited access to a law library.
25 (Doc. 50 at 2.) Appointing counsel for an incarcerated plaintiff in a Section 1983 action,
26 pursuant to 28 U.S.C. Section 1915(e)(1), is a matter within the Court's discretion. *See*
27 *Campbell v. Burt*, 141 F.3d 927, 931 (9th Cir. 1998). Generally, a person has no right to
28 counsel in civil actions. *See Storseth v. Spellman*, 654 F. 2d 1349, 1353 (9th Cir. 1981).

1 The Court may, upon demonstration of exceptional circumstances, appoint counsel for
2 indigent civil litigants pursuant to Section 1915. *See Agyeman v. Corrections Corp. of*
3 *America*, 390 F.3d 1101, 1103 (9th Cir. 2004). When determining whether exceptional
4 circumstances exist, the Court must consider the likelihood of success on the merits as
5 well as the ability of the plaintiff to articulate his claims in light of the complexity of the
6 legal issues involved. *See Palmer v. Valadez*, 560 F.3d 965, 970 (9th Cir. 2009). To this
7 point, Plaintiff has not demonstrated a likelihood of success on the merits. Nor has
8 Plaintiff displayed an inability to articulate his claims in light of the complexity of the
9 legal issues involved. The Court therefore denies Plaintiff's Motion to Appoint Counsel.

10 For the reasons discussed above, IT IS ORDERED adopting in whole the Report
11 and Recommendation (Doc. 47) submitted by Judge Fine in this matter, and all reasoning
12 within it.

13 IT IS FURTHER ORDERED denying Plaintiff's Motion for Leave to Amend
14 (Doc. 42).

15 IT IS FURTHER ORDERED denying Plaintiff's Motion/Request for Entry of
16 Default Pursuant to Federal Rule of Civil Procedure Rule 55 (Doc. 46).

17 IT IS FURTHER ORDERED that the Clerk prepare a service packet using the
18 address for Defendant Gatlin from Document 44. The United States Marshal must serve
19 a copy of this Order on Defendant Gatlin and within 10 days after personal service is
20 effected, file the notice of service for Defendant Gatlin.

21 IT IS FURTHER ORDERED that Defendant Gatlin shall file her Answer or other
22 responsive pleading to Claim Three of the Third Amended Complaint within 21 days of
23 of service being effected.

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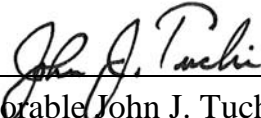
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1 IT IS FURTHER ORDERED denying Plaintiff's Motion to Appoint Counsel
2 (Doc. 50).

3 Dated this 22nd day of January, 2016.

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6 Honorable John J. Tuchi
7 United States District Judge
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